United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-1166

To be argued by
ANGUS MACBETH

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1166

UNITED STATES OF AMERICA,

Appellee,

—v.—

DAVID RODRIGUEZ, a/k/a "Slick"

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

ROBERT B. FISKE, JR.,
United States Attorney for the Southern District of New York, Attorney for the United States of America.

ANGUS MACBETH,
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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1166

UNITED STATES OF AMERICA,

Appellee,

—v.—

DAVID RODRIGUEZ, a/k/a "Slick",

Defendant-Appellant.

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

David Rodriguez appeals from a judgment of conviction entered on March 29, 1976, in the United States District Court for the Southern District of New York after a five-day trial before the Honorable Constance Baker Motley, United States District Judge, and a jury.

Information 76 Cr. 144 * was filed in four counts on February 11, 1976, charging Rodriguez and others with

* Rodriguez, and co-defendants Soto, Fondeur and Delvas were indicted originally on August 27, 1975, 75 Cr. 855. A superseding Indictment, 76 Cr. 17, was filed on January 8, 1976, which principally added charges under Title 26 and removed Rodriguez from the indictment on the basis of a mistaken belief by the Government that Rodriguez was a juvenile and hence could not be preceeded against by indictment. When it was established that Rodriguez was not a juvenile, Information 76 Cr. 144 was filed setting forth the same charges as did superceding Indictment 76 Cr. 17, except that Rodriguez was added to the defendants named therein.

conspiracy to engage in the business of dealing in firearms, in violation of Title 18, United States Code, Section 371, (Count One); unlawfully engaging in the business of dealing in firearms, in violation of Title 18, United States Code, Section 922(a)(1) (Count Two); unlawfully possessing a firearm not registered to him in the National Firearms Registration and Transfer Record, in violation of Title 26, United States Code, Section 5861(d) (Count Three); and with unlawfully transferring a firearm without filing the appropriate transfer application, in violation of Title 26, United States Code, Section 5861(e) (Count Four). Louis Soto, Ricardo Fondeur and Jose Delvas were charged with Rodriguez in Counts One and Two; Soto and Fondeur were also charged in Counts Three and Four. Trial commenced against all defendants on February 23, 1976, and concluded on February 26, 1976. With respect to Rodriguez, the jury returned a verdict of not guilty on Counts One and Two and a verdict of guilty on Counts Three and Four.*

On March 29, 1976, Rodriguez was sentenced as a youthful offender pursuant to the provisions of Title 18, United States Code, Section 5010(a). Imposition of sentence was suspended and Rodriguez was placed on probation for two years.

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* Fondeur and Delvas were acquitted on all counts against them. Soto was convicted on Counts Three and Four and acquitted on Counts One and Two. Upon his conviction on Counts Three and Four, Soto was sentenced to two years imprisonment; execution of sentence was suspended and he was placed on probation for two years consecutive to the probationary term he received as a result of his conviction on Indictment 75 Cr. 856 (RLC). He has not appealed his conviction.

Statement of Facts

The Government's Case

At trial the Government presented the testimony of George McNenny and Louis Diaz, undercover agents of the Bureau of Alcohol, Tobacco and Firearms. These agents described a series of transactions in which the defendants had sold them various guns.

George McNenny testified that on April 9, 1975, he met Louis Soto in the South Bronx and that Soto sold him a Smith and Wesson .45 caliber revolver for $150. (Tr. 39-41).* Following that transaction, Soto took McNenny to meet two associates of his, Rodriguez and Fondeur. All four went to an empty apartment where Soto, Rodriguez and Fondeur sold McNenny a Harrington and Richardson .22 caliber revolver and a 20-gauge Mossberg sawed-off shotgun ** for a total of $190. (Tr. 45-53). Rodriguez brought the shotgun into the room where McNenny purchased it. (Tr. 45). At the time of the sale, Rodriguez received part of the money which McNenny paid Soto for the .22 revolver and the shotgun. (Tr. 52-53). McNenny's testimony was corroborated by an agent who had conducted surveillance. (Tr. 294-97).

On May 2, 3 and 4, 1975, McNenny had a further conversation with Soto about purchasing guns. (Tr. 56-58). On May 7, 1975, McNenny and Diaz met Soto and Delvas in the South Bronx and purchased a .38 caliber Rossi for $150. (Tr. 59-71, 236-240). On May 8,

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* "Tr." refers to the trial transcript; "GX" refers to Government Exhibit; numerical references followed by "a" refer to Appellant's Appendix; "Br." refers to Appellant's Brief.

** This sawed-off shotgun was the subject of Counts Three and Four of the information.

1975, McNenny met Soto and Rodriguez in the South Bronx and bought a .38 caliber Charter Arms hand gun from them for $200. (Tr. 72-75). After May 8, 1975, McNenny had further negotiations with Soto about the purchase of additional guns. (Tr. 75-77).

The Government demonstrated through Gunnar Erickson, an expert in weapons, that the sawed-off shotgun, the subject of Counts Three and Four, was a "firearm" and a "shotgun" within the meaning of the statute, Title 26, United States Code, Section 5845(a)(1) and (d). (7a-28a). The Government did not attempt to prove that the sawed-off shotgun was not an "antique firearm" under Title 26, United States Code, Section 5845(a and (g).

By self-authenticating certificates of search, the Government showed that neither Rodriguez, Soto nor Fondeur had registered the sawed-off shotgun in the National Firearms Registration and Transfer Record, nor had any of them made the necessary application for the transfer of the weapon. (GX 7). It was stipulated that all the guns were operable. (Tr. 348-49).

The Defense Case

Rodriguez presented no witnesses.

ARGUMENT

POINT I

The District Court Properly Denied Defendant's Request For An Instruction That The Jury Must Find That The Firearm Was Not An Antique.

Defendant Rodriguez claims that the trial court commited reversible error by refusing to instruct the jury that in order to convict it must find the firearm was not an antique. The request for this instruction was made even though Rodriguez had not raised a defense based on the statutory exception for antique firearms. Indeed, the defendant conceded in the trial court and here on appeal that he is relying on a theory which would require the Government to negate this exception to the provisions of the gun law. This position has no foundation in law.

The legal context of defendant's argument is the National Firearms Act Amendments of 1968, 26 U.S.C. § 5801 *et seq*, which prohibit possession of a firearm which is not registered in the National Firearms Registration and Transfer Record, 26 U.S.C. § 5861(d), and the transfer of a firearm in violation of the terms of the act, 26 U.S.C. § 5861(e). Rodriguez was found guilty of both sections of the statute. The term "firearm" is defined by the statute and includes "a shotgun having a barrel or barrels of less than 18 inches in length." 26 U.S.C. § 5845(a)(1). Shotguns, in turn, are defined as set forth in 26 U.S.C. § 5845(d). The statute also establishes an exception by which "antique firearms" are exempt from the operation of the act, 26 U.S.C. § 8845 (a). An "antique firearm" is defined as follows:

> The term "antique firearm" means any firearm not designed or redesigned for using rim fire or conventional center fire ignition with fixed

> ammunition and manufactured in or before 1898 (including any matchlock, flintlock, percussion cap, or similar type of ignition system or replica thereof, whether actually manufactured before or after the year 1898) and also any firearm using fixed ammunition manufactured in or before 1898, for which ammunition is no longer manufactured in the United States and is not readily available in the ordinary channels of commercial trade. 26 U.S.C. § 5845(g).

Referring the district court to this provision of the law, defense counsel for Rodriguez sought an instruction that, to convict the defendant, the jury must find the shotgun was not antique.* Defense counsel explicitly stated that the theory of the request was that the Government had the burden to negate this exception and the district court responded that the defense failed to raise the issue.**

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* The request, as articulated by defense counsel, was as follows:

> Mr. Pravda: Lastly, your Honor, I would request your Honor to charge that in both the Title 18 definition and the Title 26 definition for firearms an exception is created taking outside the ambit of the statute any antique firearms which is there defined as being "a weapon manufactured in or before 1898," and I would ask your Honor to charge that the jury must find that these weapons are not antique weapons for them to bring in a verdict of guilty and to any count. (30a-31a).

** The colloquy on this point was as follows:

> Mr. Pravda: My claim is that the burden is upon the Government to prove its case; that this is a statutory exception to violation of the law and that the Government must close that loophole to prove its case beyond a reasonable doubt.
>
> The Court: What you are doing is injecting something into the case that isn't here.
>
> Mr. Pravda: Your Honor, the statute has been here. (31a).

Judge Motley was clearly correct in her determination that the exception for antique guns was an affirmative defense. As is conceded by defendant, the exclusion of antiques from the definition of "firearms" constitutes an exception to the terms of the statute. It is well settled that exceptions to a statutory provision must be raised as affirmative defenses and need not be negated by the Government unless raised by the defense. The Supreme Court so held in *McKelvey* v. *United States*, 260 U.S. 353, 357 (1922), where it stated: "It is incumbent upon one who relies on such an exception to set it up and establish it." This Court followed the *McKelvey* ruling in *United States* v. *Messina*, 481 F.2d 878 (2d Cir.), *cert. denied*, 414 U.S. 974 (1973), holding that in a case involving conspiracy to sell plates for the printing of currency, the Government need not negate the exception for sale to the United States. The Ninth Circuit has taken the same position with respect to exceptions to the gun control statute at issue here. *United States* v. *Oba*, 448 F.2d 892, 894 (9th Cir. 1971).

Under a variety of other statutes, courts have consistently held that exceptions to the statutory scheme must be asserted as affirmative defenses. *United States* v. *Ramzy*, 446 F.2d 1184, 1186 (5th Cir. 1971) (defendant selling drugs must bring himself within exception to drug statute allowing sales by specified classes of individuals); *Tritt* v. *United States*, 421 F.2d 928, 929-30 (10th Cir. 1970) (same as *Ramzy*); *United States* v. *Rowlette*, 397 F.2d 475, 479 (7th Cir. 1968) (same as *Ramzy*); *United States* v. *Safeway Stores, Inc.*, 252 F.2d 99, 101 (9th Cir. 1958) (small business exception to meat inspection laws must be asserted by defendant); *7 Fifths of Old Grand-Dad Whiskey* v. *United States*, 158 F.2d 34, 36 (10th Cir.), *cert. denied*, 330 U.S. 828 (1946) (burden is on defendant to bring himself within exception allowing importation of some forms of alcohol into Kansas); *Nicoli* v. *Briggs*, 83 F.2d 375, 379 (10th Cir. 1936) (Govern-

ment need not negate exception to statute authorizing deportation of dealers in narcotics but not addicts of narcotics).

Rodriguez attempts to avoid these precedents by limiting them to instances where the applicability of the exception depends on facts within the knowledge or control of the defendant. (Br. 9, 11). However, the cases do not support this proferred distinction. In *McKelvey* v. *United States*, *supra*, the exception pertained to public lands which had been improved or occupied; in *7 Fifths of Old Grand-Dad Whiskey* v. *United States*, *supra*, the exception pertained to certain types of alcohol legally allowed into the state of Kansas; and in *United States* v. *Messina*, *supra*, the exception related to the sale of the United States of printing plates for currency.*

There is no claim made that defendant raised a defense based on the exception for antique firearms, nor would the record support any such claim. Indeed, Rodriguez bypassed every opportunity presented to him at trial for raising this issue. Thus, for example, when the Government called Gunnar Erickson, an expert on guns, to establish that the sawed-off shotgun was a "firearm" within the meaning of the statute, Rodriguez made no attempt to establish through Erickson that the weapon was an "antique firearm." (7a-28a). Moreover, Rodriguez entered into a stipulation that the weapon was fully operable and in that stipulation the gun was designated simply as a "firearm". (Tr. 348-50, 354; GX 10). Rodriguez thus agreed that the gun was a

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* Defendant's reliance on *United States* v. *Goodson*, 439 F.2d 1056 (5th Cir. 1971) and *Gott* v. *United States*, 432 F.2d 45 (9th Cir. 1970) is misplaced. (Br. 10-11). Neither case involved a provision which was an exception to the statute.

"firearm" without any qualification on the ground that the gun was not a "firearm" within the meaning of the statute because it was an antique. At yet another opportunity, Rodriguez failed to raise any issue based on the exception for "antique firearms." The Government offered a certification that the National Firearms Registration and Transfer Record showed no registration by Rodriguez for the gun at issue. That certification repeatedly described the weapon as a "firearm." Rodriguez's counsel objected to admission of the certification, seeking an instruction that the document did not prove that the weapon in question was a "shotgun." Defense counsel made no similar request for an instruction that it failed to establish that the gun was not an antique firearm. (Tr. 355-358).*

Having studiously avoided the issue of the exception for antique firearms as either a factual or legal matter, Rodriguez had no evidence whatsoever upon which to argue that the exception applied. Thus, had the district court granted the request and charged the jury that it must find that the firearm was not an antique, the jury would have been called upon to speculate, without the aid of any evidence, as to the antique nature of the weapon. The gun itself did not, as Rodriguez suggests, constitute evidence from which a jury could reasonably find that it was an antique. Indeed, defendant does not explain to this Court how the gun itself presented any indication of its age and other characteristics which would arguably demonstrate that it fell within the statutory exception.

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* On this record it is fair to suggest that defense counsel lay in wait until the close of the Government's case to spring this issue on the Government and the court. It was only then in oral requests to charge, which supplemented his earlier written requests, that Rodriguez first raised the issue of the antique firearm exception. (Tr. 500, 513).

This attempt to seek a verdict based on mere speculation was correctly rejected by the district court. *United States* v. *Breitling*, 61 U.S. 252, 254-55 (1858); *Pacheco* v. *United States*, 367 F.2d 878, 881 (10th Cir. 1966); *Morris* v. *United States*, 326 F.2d 192, 195 (9th Cir. 1963). The defendant is not entitled to an instruction to the jury on a theory of defense which he failed to establish by evidence or even by cross-examination and inferences drawn from the testimony of Government witnesses. *Cf. United States* v. *Alfonso-Perez*, 535 F.2d 1362, 1365 (2d Cir. 1976).

Finally, even if the request to charge properly sought to force the Government to negate an exception to the statute and even if it had been based on some evidence, it was properly denied on the indpendent ground that it did not accurately state the law with respect to the exception for antiques. Defendant's request to charge, and even his argument to this Court, was based on the mistaken assumption that the exception for antiques applies if the firearm was manufactured before 1898. In fact, the statutory exception exempts firearms manufactured in or before 1898 only if the firearm also meets one of two other conditions, namely, (a) that the firearm does not have the stated firing design or (b) that ammunition for the firearm is not readily available. Manufacture before 1898 alone is not sufficient to bring the firearm within the statutory exception.* Where a legally incorrect request is presented, defense counsel cannot claim that the district court committed error by rejecting it. *United*

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* In this respect the exception differs from its analogue in 18 U.S.C. Section 921(a)(16) and appears to reflect language favored by the House of Representatives while the language in Title 18 was favored by the Senate. 1968 U.S. Code Cong. Admin. News 4427-28, 4434.

States v. *Leonard*, 524 F.2d 1076, 1084 (2d Cir. 1975), *cert. denied*, 44 U.S.L.W. 3624 (May 3, 1976).*

POINT II

The Government's Rebuttal Summation Was Entirely Proper.

Defendant Rodriguez claims that the Government inferentially commented on the defendant's failure to present a defense and improperly attempted to shift the burden of proof to the defendant when, in rebuttal summation, the prosecutor argued that defense counsel failed to produce any registration for the sawed-off shotgun. At trial, defense counsel failed to object to this comment which precludes review on appeal, absent plain error, and which "indicates counsel's own difficulty in finding any prejudice." *United States* v. *Canniff*, 521 F.2d 565, 572 (2d Cir. 1975), *cert. denied*, — U.S. — (1976).

Considered in context, it is apparent that the statement was proper. To prove that no registration existed, the Government had put in evidence a certificate attesting to an unsuccessful search. (GX 7). In an effort to overcome this evidence, Rodriguez's counsel argued in summation that there was a reasonable doubt as to whether the Government's search of the firearm registration records was sufficiently thorough. (Tr. 561-564). In re-

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* Although the issue presented here was raised by an oral request to charge, we note that it was not properly preserved for appeal by an objection following the charge as required by Rule 30, F.R. Crim. P. *United States* v. *Leach*, 427 F.2d 1107, 1113 & n.6 (1st Cir.), *cert. denied*, 400 U.S. 829 (1970); *United States* v. *Sherman*, 171 F.2d 619 (2d Cir. 1948) (L. Hand, *C.J.*), *cert. denied*, 337 U.S. 931 (1949).

buttal, the prosecutor pointed out that if defense counsel believed that the registration existed, they would have produced it. This did not amount to a comment on the defendant's failure to testify since this proof, if available, could be offered without the defendant's testimony. *United States* v. *Noah*, 475 F.2d 688, 695-96 (9th Cir.), *cert. denied*, 414 U.S. 821 (1973); *United States* v. *Lipton*, 467 F.2d 1161, 1168 (2d Cir. 1972), *cert. denied*, 410 U.S. 927 (1973); *United States ex rel. Leak* v. *Follette*, 418 F.2d 1266, 1269 (2d Cir. 1969), *cert. denied*, 397 U.S. 1050 (1970).

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

ROBERT B. FISKE, JR.,
United States Attorney for the Southern District of New York, Attorney for the United States of America.

ANGUS MACBETH,
AUDREY STRAUSS,
Assistant United States Attorneys, Of Counsel.

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA :

v : AFFIDAVIT OF MAILING

DAVID RODRIGUEZ, :
a/k/a "Slick" : 76-1166
Defendant-Appellant :

STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

ANGUS MACBETH being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York

That on the 27th day of September 1976 he served a copy of the within brief by placing the same in a properly postpaid franked envelope addressed as follows:

DAVID PRADA
10 E. 40th St.
NEW YORK, N.Y. 10016

And deponent further says that he sealed the said envelop and placed the same in the mail chute drop for mailing in t U.S. Attorney's Office, Foley Square Borough of Manhattan, City of New York.

Angus Macbeth

Sworn to before me this
27th day of September, 1976

Maria A. Israelian

MARIA A. ISRAELIAN
Notary Public, State of New York
No. 31-4521851
Qualified in New York County
Term Expires March 30, 1978